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Supreme Court, U.S.
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No. 01-568

In The

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

MICHAEL FITZWATER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael Fitzwater, respectfully submits that the decision below correctly analyzed the facts and applied governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

Michael Fitzwater was arrested by the police of the City and County of San Francisco, California, on April 14, 1994. In the course of being placed in the custody of the Sheriff of San Francisco in the County Jail, which is under the exclusive control and operation of the San Francisco County Sheriff, he was brutalized by deputy sheriffs to the degree that he suffered spinal fractures, a ruptured spinal disc and severe dental damage.

On March 23, 1995, Fitzwater filed an action in the Superior Court of the State of California, County of San Francisco against the City and County of San Francisco, Sheriff of San Francisco, et al. for civil rights violations under 42 U.S.C. § 1983. The City and County of San Francisco on June 23, 1995 moved the case to the Federal District Court. It was filed by that Court on August 18, 1995. On March 1, 1999 Harriet Ross was substituted as attorney for the Plaintiff.

On April 8, 1999 the City Attorney moved the District Court for removal of the action back to the State Court and dismissal of claims pursuant to 42 U.S.C. § 1983. That Motion was granted. Plaintiff appealed the Order of

Removal and Dismissal and that appeal was granted by the Ninth Circuit on May 24, 2001. The Court followed its decision in *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir. 2001), a related case. The Court found that the Sheriff of San Francisco in his duties as a jail keeper is not a state agency and not entitled to Eleventh Amendment Immunity.

I. PETITIONER'S REASONS FOR GRANT OF THE WRIT ARE IN ERROR

1. The Petitioner advocates that the Federal Court follow the decisions of the State Courts in determining the status of a County Sheriff as a State Agency in the execution of its duties as a jail keeper and administration of the jail. California Courts have not ruled on the status of a County Sheriff in his capacity as a jail keeper with regard to being an arm of the State in executing those duties, and thus eligible for Eleventh Amendment Immunity.

Petitioner relies on the case of *McMillian v. Monroe County*, 20 U.S. 781 (1947) to support his petition. That case dealt with a sheriff in Alabama that had law enforcement duties, such as investigation of crimes, etc. In *McMillian*, the sheriff was investigating a homicide case which was a duty involving enforcing the laws of the state of Alabama. The Court found that the Sheriff was designated by the Constitution of Alabama an Executive Officer of the State. As such, the sheriff was not a policy maker when enforcing the law, and acted on behalf of the State rather than the county. The Court stated at page 1737, "Thus we are not seeking to make a characterization

of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity." On page 1742, the court stated "Thus since it is entirely natural that both the role of sheriffs and the importance of counties vary from State to State, there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State and not in another."

Petitioner cites *County of Los Angeles v. Superior Court (Peters)*, 68 Cal. App. 4th 1166 (1998), *rev. den'd* (March 17, 1999), to support his position that a County Sheriff is an arm of the State. That case involved the execution of a warrant, a **law enforcement function** of the Sheriff.

Petitioner claims that in the decision of the Ninth Circuit in the case at bar, the Court relied exclusively on its decision in *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir. 2001). The *Streit* case reviewed all the pertinent cases in the Federal and State Courts dealing with the status of a County Sheriff as administrator of a jail. The Appellate brief in the case at bar contained additional authorities to support the appellant's position that the County Sheriff, in his capacity as a jail keeper, is not an arm of the state, because in executing those duties, he is not enforcing the laws of the state. He has exclusive control of the administration of the jail and as such he is a County agent. *Streit*, supra.

There are no California cases reported that determine that the County Sheriff is a State agent in the execution of his duties as a jail keeper and administrator of the jail.

II. THE RECENT DECISIONS OF THE NINTH CIRCUIT ARE NOT IN CONFLICT WITH CALIFORNIA CASE LAW REGARDING THE JAIL KEEPER FUNCTION OF COUNTY SHERIFFS

1. Petitioner cites *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967) as a basis for the Federal Court to follow State Appellate Court decisions regarding State Law. The Court, at page 453, states "Thus under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling." The *Bosch* case dealt with a state court ruling regarding the application of federal estate tax wherein the IRS was not made a party to the action.

In *Bush v. Gore*, 531 U.S. 98 (2000) the Court reversed the ruling of the Supreme Court of Florida regarding a recount of votes because it violated equal protection and due process. *Bush v. Gore* is a case where the Federal Court did not follow state court because it involved Federal Constitutional principles.

Other cases cited by Petitioner in support of the Federal Court following state court decisions are diversity of citizenship cases not involving Federal statutes, *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) a tort suit and *Klaxon Co. v. Stenter Electric Mfg. Co.*, 3223 U.S. 487 (1941) a contract case. Neither of these cited cases apply to the issues of the case at bar. Neither case involved a Federal statute.

The California case cited, *Pitts v. County of Kern*, 17 Cal. 4th 340 (1998) dealt with the function of the District Attorney in prosecuting a case. The Court held that the function of the District Attorney in prosecuting a person accused of crime is a **law enforcement function** and therefore the district attorney represented the state and had Eleventh Amendment Immunity from suit in that capacity. The Supreme Court of California held that the District Attorney is supervised by the Attorney General in the oversight of criminal prosecutions, training and policy. The district attorney was not the prime policy maker in this regard and therefore is entitled to Eleventh Amendment Immunity.

III. CERTIORARI IS NOT NEEDED IN THIS CASE

In his appellate brief, the Respondent cited *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), *cert. den.*, 117 S.Ct. 2511 (1997). In that case two deputy sheriffs sued the Sheriff of Rockingham County, North Carolina for wrongful discharge. The functions of the sheriff in that case were remarkably similar to those of the San Francisco County Sheriff. Indicia of County control, county residents hire the sheriff through election, the county government sets their pay, the county provides for the number of deputies and the county attorney is the official with the power to move to dismiss the sheriff. No state agency or official oversees the activities of sheriffs. The Court followed the principles enunciated in *Ram Ditta v. Maryland National Capital Park and Planning Commission*, 822 F.2d 456 (4th Cir. 1987). The *Ram Ditta* Court stated at page 457, "(2) While many factors must be considered in

determining whether an entity is the *alter ego* of the state, it is generally held that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded. . . . We agree that this is a most important consideration for 'when the action is in essence one for the recovery of money damages from the state, the state is the real substantial party in interest.' . . . Other important inquiries underlying our consideration of eleventh amendment immunity include, but are not necessarily limited to whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law." On page 458 n.5, "Although a federal court may consider how the entity is treated under state law, the question of whether an agency is the *alter ego of the state* and thereby immune from federal jurisdiction under the eleventh amendment *is a* question of federal, not state law."

The *Harter* decision also relies on *Hess v. Port Authority Trans-Hudson*, 115 S.Ct. 394 (1994), which held at page 404, "Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determination."

Section 24000(c), California Government Code, designates a County Sheriff as a "County Officer". California Elections Code § 314 "County Office: any elected officer enumerated in Div. 2 (Commencing at 24000) of Title 3 of the Government Code." Article XI, § 4(c) of the Charter of San Francisco provides for the election of the Sheriff, for replacement of the Sheriff by the Mayor and Board of Supervisors under various circumstances. Article VI, § 6.107 and Article XV. He may be recalled by election of

the political unit, Calif. Elections Code § 11200, et seq. The Charter outlines the budget process for Department Heads (Sheriff qualifies as a department head) Article IX, § 9.100 et seq. California Govt. Code § 815.2 requires that monetary damages for 42 U.S.C. § 1983 claims be paid by the county and not the state. The San Francisco County Sheriff is given "sole and exclusive authority to keep the county jail and prisoners." (Cal. Govt. Code § 26605). Expenses of maintaining the County Jail by Sheriffs are to be paid from the County Treasury. (California Penal Code § 4015).

On September 1, 1980, in Opinion No. 80-119, the Attorney General of the State of California gave his opinion whether a County Sheriff could be sued for false imprisonment. The situation was similar to the *Streit* case. The Attorney General advised that a sheriff may be subject to liability for false imprisonment, if he does not exercise reasonable diligence to effect the release of a defendant whose discharge from custody has been ordered by the Court.

CONCLUSION

1. 42 U.S.C. § 1983 is a Federal Statute and the Federal Court will determine the violation of those rights by a County Sheriff. In doing so, the Federal Courts may consider State Court decisions regarding the nature of the activity of the County Sheriff, whether it is a county or state agent for purposes of eligibility for Eleventh Amendment Immunity.

2. One of the most determinative indicia of whether a County Sheriff is acting as a County or State agent is which entity would pay damages for the acts of the sheriff. If it would be the State then, the Sheriff would be the *alter ego* of the state and would enjoy Eleventh Amendment Immunity. If the County would have to pay, then there would be no Eleventh Amendment Immunity. In addition the Court considers the autonomy of the Sheriff in executing his duties. If he is not supervised by a State agent in those duties then he is a County agent and ineligible for Eleventh Amendment Immunity. Other factors are the extent to which the sheriff is involved locally or statewide. Local involvement designates County agent as opposed to State agent.

3. California Statutes, Constitution and San Francisco County Charter develop the nature of the San Francisco County Sheriff as an autonomous administrator of the County Jail. He is paid by the County, his expenses are paid by the County and if he is sued for damages, the damages are paid by the County. All these elements governing the position of the County Sheriff of San Francisco make him a County actor and not a State agent. Therefore he is not eligible for Eleventh Amendment Immunity.

4. The Ninth Circuit decision in the within case was proper and certiorari should not be granted Petitioner.

Dated: November 13, 2001

Respectfully submitted,

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